

No. 18-56221

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAN DIEGO COMIC CONVENTION
Plaintiff-Appellee,

v.

DAN FARR PRODUCTIONS, DANIEL FARR, and BRYAN
BRANDENBURG,
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of California Hon. Anthony J. Battaglia,
District Judge-Case No. 14-CV-1865-AJB-JMA

AMICUS BRIEF OF ZACHARY LEVI, MANU BENNETT, KEVIN SORBO,
JULIE CAITLIN BROWN, JIM BURLESON, AND JOHN D. MAATTA IN
SUPPORT OF DEFENDANTS-APPELLANTS DAN FARR
PRODUCTIONS, DANIEL FARR, AND BRYAN BRANDENBURG

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INTEREST OF AMICI CURIAE

Zachary Levi is an actor, recently staring in the soon to be released movie *Shazam!* as well as in other movies such as *Tangled*, *Thor: The Dark World*, *Thor: Ragnarok* and the television series *Chuck*. Mr. Levi has also had voice roles in video games including *Halo: Reach*, *Fallout: New Vegas*, and *Tomb Raider*. Mr. Levi is a longtime participant in various comic conventions throughout the United States and world. On average Mr. Levi has attended about five comic conventions

per year for the last twelve years. Mr. Levi also produced an annual comic convention called Nerd HQ from 2011 through 2017.

Manu Bennett is an actor known for his role in movies including *The Hobbit: An Unexpected Journey*, *The Hobbit: The Desolation of Smaug*, and *The Hobbit: The Desolation of Smaug*, and television series including *Arrow*, *The Shannara Chronicles*, and *Spartacus*. Mr. Bennett is a longtime participant in various comic conventions throughout the United States and world. On average Mr. Bennett has attended between 10 and 20 comic conventions per year for the last eight years.

Kevin Sorbo is an actor, producer, and director and starred in the popular television series *Hercules: The Legendary Journeys* and *Andromeda* and has appeared in numerous other series including *Xena: Warrior Princess*, *Two and a Half Men*, and *Supergirl*. Mr. Sorbo has also provided voice talent for video games including *God of War III* and the *Skylanders* franchise. Mr. Sorbo is a longtime participant in various comic conventions throughout the United States and world. Mr. Sorbo began attending comic conventions in 1995, and he is invited to attend approximately 30 comic conventions per year. On average, Mr. Sorbo attends about five comic conventions per year. Mr. Sorbo is aware of 100 or more comic conventions throughout the world.

Jim Burleson is an actor and a producer of comic conventions including the Albuquerque Comic Con and the Santa Fe Comic Con. Mr. Burleson has been producing comic conventions since 2011 and produces an average of four comic conventions per year. Mr. Burleson uses his comic conventions to promote the building of homes for homeless veterans. The Albuquerque Comic Con currently has a positive net \$3 million impact on Albuquerque, New Mexico each year it is held. Approximately 500 vendors, most of whom are local to New Mexico, purchase space at the Albuquerque Comic Con, and many of them use the convention as a significant source of income.

The comic conventions Mr. Burleson produces could not afford to continue to use the phrase “comic con” if forced to license that phrase from the San Diego Comic Convention. Mr. Burleson has spent eight years and hundreds of thousands of dollars marketing his comic convention in Albuquerque as the Albuquerque Comic Con. His experience has been that when starting the branding for a new comic convention it takes years to get attendance at that convention up to a level similar to the attendance experienced at his convention in Albuquerque which he has been marketing for years. If forced to rename and remarket his current comic conventions, he would incur significant expense, and some of his conventions would be at risk of permanent closure.

Julie Caitlin Brown is widely regarded as an expert in the Comic Con field. She has owned Illumina Productions, LLC since 1997 and has consulted events in Dubai, Brazil, Paris, Italy, England, and the United States, including Puerto Rico, on how to run efficient and profitable events. Ms. Brown manages top names in the genre entertainment space and has worked with over 200 events worldwide booking her talent to meet their fans.

John D. Maatta, a licensed California attorney for 40 years, is the CEO of Wizard Entertainment, Inc. (“Wizard”). Wizard is the producer of numerous pop-culture events each year in cities all across the Country. Wizard consistently produces 14-17 annual events. Wizard Events attract fans of comics, motion pictures and television and pop-culture generally. Mr. Maatta customarily attends most if not all of the Wizard pop-culture shows. Based on his position and his experience it is Mr. Maatta’s opinion that the term Comic Con is a generic and is used nationally without any reference of knowledge relating to San Diego.

These individuals have always understood “comic con” to be an abbreviation for the generic phrase “comic convention.” Similarly, the comic conventions attended by these individuals have all been referred to by attendees, guests, and producers as “comic cons.” These individuals have never gone to a “comic con” other than the San Diego Comic Convention that they believed was

affiliated with the San Diego Comic Convention due to the use of the term “comic con”. These individuals each have an interest in the outcome of this litigation.

STATEMENT OF COMPLIANCE WITH RULE 29(a)

No party or party’s counsel authored this brief in whole or in part; no party or party’s counsel contributed money that was intended to fund the preparation or submission of this brief; and no other person except amici curiae or their counsel contributed money to fund the preparation and submission of this brief.

ARGUMENT

I. THE TERM “COMIC CON” IS A GENERALLY USED ABBREVIATION OF THE TERM “COMIC CONVENTION”

“A generic term is one that refers, or has come to be understood as referring, to the genus of which the particular product is a species.” *Surgicenters of America, Inc. v. Medical Dental Surgeries, Co.*, 601 F.2d 1011, 1014 (9th Cir. 1979).

Generic terms “cannot become a trademark under any circumstances.” *Id.* The term “comic con” is an abbreviation of the term “comic convention.” The delineating factor in any name in which “comic con” is used is not “comic con” but rather what comes before or after that term, *e.g.*, Salt Lake City, San Diego, Central PA, Albuquerque, Madison, North Carolina, Liverpool. The term “comic con” simply identifies the genus of the convention being held, that of a convention paying homage to comics and things comic related. It is for that reason the term

“comic con” is so ubiquitously used by comic conventions, their guests, their attendees, and even members of the public who have never been to a comic convention. Allowing the San Diego Comic Convention to maintain a trademark and assert exclusive use of the term “comic con” would be analogous to allowing a particular producer of a circus to trademark the term “circus” to the exclusion of the hundreds if not thousands of other producers of circuses throughout the country.

The Amici Curiae, taken as a group, have been producing, attending, and participating in comic conventions in various capacities for approximately a decade, and for some, multiple decades. Not one has ever chosen to attend or participate in a comic convention marketed as a “comic con” because he or she understood any such convention to be affiliated in some way with San Diego

Comic Convention. Rather, all understand “comic con” to be a generally used abbreviation of the generic term “comic convention” and in the experience of all

Amici Curiae, the public at large understands “comic con” to be an abbreviation of that same generic term.

II. ALLOWING SAN DIEGO COMIC CONVENTION EXCLUSIVE USE OF “COMIC CON” WILL NEGATIVELY IMPACT THE PUBLIC

The policy behind not allowing one party to claim exclusive use of a generic term is that “no matter how much money and effort the user of a generic term has

poured into promoting the sale of its merchandise and what success it has achieved in securing public identification, it cannot deprive competing manufacturers of the product of the right to call an article by its name.” *See Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9 (2d Cir. 1976) (internal citations omitted); *see also Anti-Monopoly, Inc. v. General Mills Fun Group, Inc.*, 684 F.2d 1316, 1319 (9th Cir. 1982) (“[O]ne competitor will not be permitted to impoverish the language of commerce by preventing his fellows from fairly describing their own goods.”) (internal citations omitted). Permitting San Diego Comic Convention exclusive right to the use of the generic term “comic con” will have the effect of inhibiting the ability of all other organizers of comic conventions to describe their events with the generic term by which such events are known.

If San Diego Comic Convention is allowed exclusive use of “comic con” hundreds of conventions will be forced to incur the cost of either licensing the use of “comic con” from San Diego Comic Convention or of renaming and/or remarketing their events. Many comic conventions will not be able to afford these costs and would be forced to close. The closure of comic conventions would have a negative impact on comic convention producers, guests, organizations guests represent, vendors, attendees, and the cities and venues where such conventions are held.

CONCLUSION

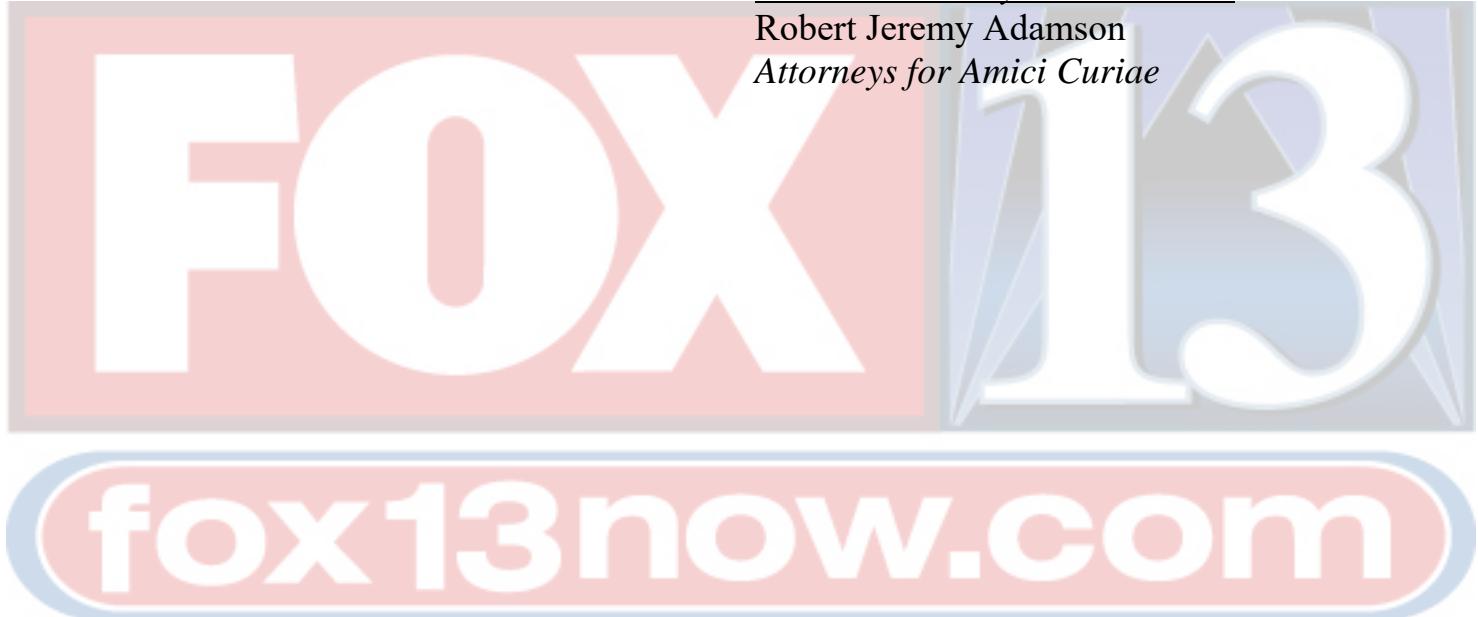
For the foregoing reasons, the judgment of the district court should be reversed.

Date: March 1, 2019

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 1553 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Times New Roman 14-point font.

Date: March 1, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2019, I electronically filed the foregoing
AMICUS BRIEF OF ZACHARY LEVI, MANU BENNETT, KEVIN SORBO,
JULIE CAITLIN BROWN, JIM BURLESON, AND JOHN D. MAATTA IN
SUPPORT OF DEFENDANTS-APPELLANTS DAN FARR
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Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by

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Participants in the case who are registered CM/ECF users will be served by
the appellate CM/ECF system.

Date: March 1, 2019

/s/ Robert Jeremy Adamson

Robert Jeremy Adamson

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